

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

Universal Service)	WC Docket No. 06-122
Contribution Methodology)	

**REPLY COMMENTS
of
NTCA–THE RURAL BROADBAND ASSOCIATION**

I. INTRODUCTION & SUMMARY

NTCA–The Rural Broadband Association (“NTCA”)¹ hereby submits these reply comments addressing the record compiled in response to the Notice of Proposed Rulemaking issued in the above-captioned docket.² The NPRM seeks comment on a proposed overall cap on the Universal Service Fund (“USF” or “Fund”). As demonstrated herein, the record in this proceeding does not support the proposal. More specifically, an overall cap is supported by neither the clear statutory language found in Section 254 of the Communications Act, as amended by the Telecommunications Act of 1996 (“1996 Act”), nor good public policy.

Like NTCA, most parties commenting on the NPRM judge the proposal for an overall cap on the USF to be contrary to clear statutory language and a step that would place at risk the distinct but complementary missions of universal service as Congress intended and articulated in the 1996 Act. With respect to the statute, parties agree with NTCA that Section 254 clearly sets out the determination already made by Congress for separate universal service mechanisms, each with its own “sufficient, predictable, and specific” funding. By contrast, those scant few

¹ NTCA is an industry association composed of nearly 900 rural local exchange carriers (“RLECs”). While these entities were traditional rate-of-return-regulated telecommunications companies and “rural telephone companies” as defined in the Communications Act of 1934, as amended, all of NTCA’s members today provide a mix of advanced telecommunications and broadband services, and many also provide video or wireless services to the rural communities they serve.

² *Universal Service Contribution Methodology*, WC Docket No. 06-122, Notice of Proposed Rulemaking, FCC 19-46 (rel. May 31, 2019) (“NPRM”).

parties supporting a cap ignore the actual words of the statute altogether, asserting without basis that the Commission should make funding tradeoffs that Congress already made.

Parties commenting on the NPRM also note that an overall cap on the Fund is not even necessary given that mechanisms in place already impose firm budgets on the programs, or at the very least, allow the Commission to review and control spending. These parties further note that an overall cap would undermine the predictability of support that is crucial for these programs to work as intended – as these parties note, such an injection of unpredictability would limit the effectiveness of each of the individual mechanisms and run counter to the clear Congressional directive for “predictability.”

II. THE RECORD IN THIS PROCEEDING DOES NOT SUPPORT THE IMPOSITION OF AN OVERALL CAP ON THE UNIVERSAL SERVICE FUND.

A. A diverse array of stakeholders agree that an overall cap on the USF would run counter to the clear statutory directive found in Section 254 for funding that is “sufficient, predicable, and *specific*” for each of the individual mechanisms.

An overall USF cap, whether sized to meet current overall demand or even the sum of currently authorized levels plus inflation, is inconsistent with the proper fulfilment of universal service as set forth by Congress in Section 254 of the 1996 Act. Numerous commenters agree that Congress did not envision an overall cap but rather intended separate mechanisms³ – and those that support such a cap fail altogether to engage in legal analysis or hearken back to the statute in raising their arguments.

³ For example, Comments of the Schools, Health & Libraries Broadband (“SHLB”) Coalition, WC Docket No. 06-122 (fil. Jul. 29, 2019), p. 1; Comments of the Consortium for School Networking (“CoSN”), WC Docket No. 06-122 (fil. Jul. 29, 2019), pp. 2-4; Comments of New America’s Open Technology Institute (“OTI”), WC Docket No. 06-122 (fil. Jul. 29, 2019), pp. 12-13; Comments of GVNW Consulting, Inc. (“GVNW”), WC Docket No. 06-122 (fil. Jul. 29, 2019), pp. 5-6; Comments of Public Knowledge, WC Docket No. 06-122 (fil. Jul. 29, 2019), pp. 22-27.

For example, the SHLB Coalition sums up the inconsistency with the statute that an overall USF cap represents, as well its practical effects, by stating that Section 254 requires the FCC to “provide enough funding to accomplish the goals of each of the four USF programs. If the Commission adopts and enforces an overall USF spending cap, it would have the effect of denying funding for projects that the Commission has already determined meet its program rules.”⁴ In other words, the Commission would turn the USF into a program that, even as it identifies and seeks to address the very real needs of diverse and discrete categories of users for broadband and other communications services pursuant to clear statutory mandates, could fail to provide the correct amount of funding to enable individual programs to carry out those missions.

Indeed, SHLB rightly highlights that the statutory language calling for “specific, predictable and sufficient” support is somehow absent from the NPRM.⁵ This is unfortunate, because as COSN correctly notes, these principles as set forth by Congress are foundational to universal service – they direct the Commission to “ensure that the system addresses the *specific* connectivity needs of high cost customers, rural health care providers, schools and libraries, and low income households.”⁶ As COSN further notes, “the Commission’s proposal to sweep the discrete programs designed to serve these high-need groups into a single budget framework, and then determine which of the groups are most important relative to each other, contradicts the Act’s intent and Congress’s decision to identify them for additional support.”⁷

With respect to Congressional intent, not only would an overall cap on the USF run counter to the clear language of Section 254, it would, as Public Knowledge correctly points

⁴ SHLB, p. 1.

⁵ *Id.*

⁶ COSN, pp. 3-4 (emphasis added).

⁷ *Id.*

out, take a step that Congress already rejected.⁸ As Public Knowledge discusses in its comments, policymakers have been here before – the debate that led to the final version of Section 254 in the 1996 Act included a considered but then rejected overall Fund cap.⁹ Thus, Congress has spoken, and nothing in the Act gives the Commission the authority to revisit, override, or overturn this judgment. Indeed, to the contrary, taking such action would fly in the face of clear congressional intent.

B. A diverse array of stakeholders agree that an overall cap on the USF is unnecessary as a matter of public policy.

As NTCA noted in initial comments, mechanisms already in place account for projected demand exceeding an individual program’s budget. Thus, even to the extent that Congress had granted the Commission the authority to adopt an overall cap – and as noted above the statute does not – such a cap would provide the Commission with no capability to manage fiscal accountability that it does not already possess.¹⁰ More specifically, to the extent that the Commission finds it necessary and appropriate to engage in overall spending controls for an individual program (or even for all of the individual mechanisms at once), it can do that today. Thus, an overall cap for its part does not achieve anything more than is now available to the Commission and would – as discussed further below – only undermine the predictability that is critical to their success.

⁸ Public Knowledge, pp. 27-30 (citing 141 Cong. Rec. 15345).

⁹ *Id.*

¹⁰ See Connect America Fund, WC Docket No. 10-90, ETC Annual Reports and Certifications, WC Docket No. 14-58, Establishing Just and Reasonable Rates for Local Exchange Carriers, WC Docket No. 07-135, Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, Report and Order, Further Notice of Proposed Rulemaking, and Order on Reconsideration, FCC 18-176 (rel. December 13, 2018) (increasing the High-Cost USF Program budget and adopting an inflation adjustment while retaining the Budget Control Mechanism as a spending control on the program); See also, 47 C.F.R. § 54.423 (setting forth the annual Lifeline program budget and requiring the Wireline Competition Bureau to prepare a report evaluating program disbursements if spending in the Lifeline program meets or exceeds 90 percent of the Lifeline budget in a calendar year); 47 C.F.R. § 54.507 (setting the cap for the E-Rate program and setting forth steps USAC shall take if total demand for the funding year exceeds the total support available); 47 C.F.R. § 54.675 (setting the cap for the Rural Health Care program and setting forth steps USAC shall take if total demand for the funding year exceeds the total support available).

As an example of the discussion of this issue found in the record, as SECA notes, “in particular, the E-rate program is already capped and has many structural guardrails to ensure that funds are disbursed responsibly, efficiently and in a manner that safeguards these resources.”¹¹ The High-Cost Program, for its part, has guardrails in place to ensure that support is directed to where it is needed most, is sufficient but no greater than necessary to achieve the purpose behind that spending and that support recipients are accountable for their use of distributed funds.¹² To the extent the Commission is concerned that budget caps within the individual programs or other measures require further consideration, a review of those individual mechanisms can be (and has been repeatedly) undertaken. But what the *NPRM* fails to do is explain how an overall cap on the USF would achieve this purpose.

In addition, as New America’s Open Technology Institute states, “an overall cap is a needlessly draconian way to force a holistic review of the USF programs. USAC already provides publicly available reports to Congress that detail how the four programs perform, how much money they use, how those disbursements compare to the program budgets, and the effectiveness of each program.”¹³ As a result, an overall cap is unnecessary for the Commission to have a holistic view of the spending patterns of the individual programs or their effectiveness or to have the ability to alter individual program budgets should it determine that such a step is necessary or consistent with their respective statutory missions.

¹¹ Comments of the State E-rate Coordinators’ Alliance (“SECA”), WC Docket No. 06-122 (fil. Jul. 29, 2019), p. 7.

¹² See 47 CFR § 54.707; See also *Connect America Fund*, WC Docket No. 10-90, DA 18-710 (rel. Jul. 6, 2018), ¶ 1 (adopting performance testing provisions that “promot[e] greater accountability for certain recipients of Connect America Fund (CAF) high-cost universal service support”).

¹³ OTI, p. 8.

C. A diverse array of stakeholders agree that an overall cap on the USF would undermine the predictability that is both critical to achievement of public policy objectives and required by Section 254.

For High-Cost support recipients, investing in network infrastructure with at least twenty to thirty-year useful lives leveraging borrowed capital in deeply rural areas, *predictability* is critical. Indeed, the Commission has repeatedly acknowledged that fact – as recently as last December the Commission took much-needed steps to reinject predictability into the High-Cost program that was lacking it due to the Budget Control Mechanism as well as that program’s insufficient budget.¹⁴ The Commission also just a few years ago eliminated certain caps on the program that had a similar effect.¹⁵

But, under an overall cap, any demand increase (anticipated through forecasting or not) would risk a “bleed-over effect” into the other three programs – a program operating with demand in line with its budget (as set by the Commission to achieve a specific set of goals) would, if an overall cap were adopted, be subject to unforeseeable budget cuts that would undermine that program’s overall mission. High-Cost beneficiaries would, justifiably, need to anticipate that a budget control caused by this “bleed-over effect” could be coming, resulting in suppressed deployment and potentially complicating the ability to comply with buildout requirements that presuppose “full” funding.

This same effect would ripple through the other programs. As the National Educational Association notes, it “has long believed that predictable, sustained investment in the E-rate

¹⁴ *Connect America Fund*, WC Docket No. 10-90, et al., Report and Order, Further Notice of Proposed Rulemaking, and Order on Reconsideration, FCC 18-176 (rel. Dec. 13, 2018), ¶ 82 (stating that “with a higher overall budget and a budget control mechanism that does not include a per-line reduction... we expect a higher degree of predictability for each carrier individually”).

¹⁵ *Connect America Fund*, WC Docket No. 10-90, et al., Report and Order, Declaratory Ruling, Order, Memorandum Opinion and Order, Seventh Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 14-54 (rel. Jun. 10, 2014), ¶ 132 (stating that the Quantile Regression Analysis-based caps on high-cost support “unintentionally has encouraged carriers that were not subject to the benchmarks to believe that they too needed to limit their investment in broadband-capable networks.”).

program is required to support the broadband infrastructure of our nation's schools.”¹⁶ The

Kentucky Department of Education sums it up best by stating that:

While the operation and participation levels of the E-Rate program has improved greatly over the years, for many applicants, the program is still complex and complicated. This complexity is especially evident in terms of the impact on managing and predicting budgets at the state, district, and school levels. A sustained budget/cap amount that is specific to the E-Rate program greatly reduces applicants' challenges inherent to a fluctuating amount of funds; and overall provides a more *predictable* budget planning process for states, districts, and schools.¹⁷

In other words, an overall cap would *increase* the level of complexity that recipients of USF support already face in attempting to plan for investments in their networks or other use of funds over a longer-term planning cycle. These beneficiaries struggling to make spending decisions on tight budgets would be handicapped in their processes by the knowledge that some other program's demand exceeding its budget could limit their receipt of necessary support – and they could hardly be asked to predict when this will happen. The Commission should avoid a result that injects unpredictability into programs that need reasonable certainty to achieve the goals articulated by Congress.

D. Those few parties supporting an overall cap on the USF flatly ignore the statute and the harms resulting from unpredictability.

Those few parties that support action consistent with a proposed cap fail to take stock of the actual language in the law, and do not attempt to address the effects of unpredictability on universal service missions.

¹⁶ Comments of the National Educational Association (“NEA”), WC Docket No. 06-122 (fil. Jul. 29, 2019), p. 2.

¹⁷ Comments of the Kentucky Department of Education (KDE), WC Docket No. 06-122 (fil. Jul. 29, 2019), p. 2 (emphasis added).

For example, Professor Mark Jamison’s support of the overall USF cap is based on his support more broadly for tradeoffs in government spending.¹⁸ But, even if this view has merit as an overarching public policy perspective, this is simply not a call for the Commission to make in this instance; to the contrary, Congress already made those tradeoffs in passing a law. In that law, Congress expressly directed the achievement of certain universal service objectives and established that each mechanism should meet certain criteria. In particular, Congress very clearly set forth in the statute a directive that funding for universal service, via separate mechanisms, be “sufficient, predictable, and specific.” In short, as the State Educational Technology Directors Association (“SETDA”) correctly states, a cap that is intended to allow the Commission to evaluate “tradeoffs” would “displace Congress’s judgment that ‘specific, predictable and sufficient’ support is required for each of the USF programs to meet these needs.”¹⁹ Moreover, SETDA rightly observes that “a *statutorily-baseless* system for measuring and comparing the relative value of the four USF programs would frustrate Congress’s intent and the programs’ vitally important focus on promoting connectivity for high-need consumers.”²⁰

The arguments advanced by Professor Daniel Lyons likewise miss the mark, again asserting that the Commission should substitute its own judgment and even structure for determinations that Congress has already made and tradeoffs that Congress has already considered. Specifically, the assertion that an overall cap is a second-best alternative to directly

¹⁸ Comments of Mark Jamison, WC Docket No. 06-122 (fil. Jul. 29, 2019), p. 2. Jamison further states that “[f]or every million dollars the FCC spends on universal service, the telecommunications customers that fund the programs are spending a million dollars less on housing, education, and the like. Is that a good tradeoff? We don’t know. This would also be an important topic that is raised by the presence of a cap, and another important study for FCC economists.” *Id.*

¹⁹ Comments of the State Educational Technology Directors Association (“SETDA”), WC Docket No. 06-122 (fil. Jul. 29, 2019), p. 2

²⁰ *Id.* (emphasis added).

appropriating USF funds because it would somehow lead to a more “holistic” thinking and would “create a unified vision for the future of universal service...and how each piece fits into that larger narrative”²¹ ignores what the law actually says right now. Such matters certainly are something that can form the basis of interesting public policy debates and law review articles, but practically speaking, they cannot form the basis for the Commission to sidestep the law as it stands. Thus, even if one subscribed to the notion that the judgment of Congress in preserving and advancing universal service through predictable, sufficient, and specific support for each program should be second-guessed, this is not something that the Commission should or can do.

III. CONCLUSION

For the many reasons as set forth above, the Commission should decline to adopt an overall cap on the USF.

Respectfully submitted,

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²¹ Comments of Professor Daniel Lyons, WC Docket No. 06-122 (fil. Jul. 29, 2019), p. 3.